

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
March 8, 2016

v

JAMES COCKERHAM,

No. 325316  
Jackson Circuit Court  
LC No. 14-004086-FH

Defendant-Appellant.

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Before: SERVITTO, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of being a prisoner in possession of a weapon, MCL 800.283(4). At trial, the prosecutor presented evidence that defendant possessed a sharpened metal shank while he was incarcerated. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 3 to 10 years' imprisonment. Defendant appeals as of right. For the reasons below, we affirm.

I. PROSECUTORIAL ERROR AND INEFFECTIVE ASSISTANCE

Defendant first argues that the prosecutor improperly vouched for the credibility of Corrections Officer Sean Warren, the officer who saw defendant with the shank, during closing argument by stating the following:

Now, I'm going to be honest with you, Officer Warren, he does have a personal interest in—in how the—not how the case is decided but he has a personal interest in this case. His personal interest is making sure that he goes home alive every single night.

You heard him talk about how just a short time ago there was a Michigan Department of Corrections staff member who was stabbed several times because a prisoner had a TV taken away from him. It's his job to make sure that he, his other corrections officers, the other prisoners are safe. That's his personal interest in the case.

Now, he isn't biased in any way. Both he and the defendant admitted that they never had any interaction before this date. He has no reason to come here, risk his job to lie about something about—involving someone that he doesn't even

know. He has no reason to lie. He has no bias. He doesn't get paid per weapon that he finds.

Defendant did not object to the prosecutor's statements at trial, so we review this issue for plain error. *People v Cooper*, 309 Mich App 74, 88; 867 NW2d 452 (2015). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if a defendant satisfies these three requirements, reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

When reviewing a claim of prosecutorial error, we examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Prosecutors are free to argue the facts in evidence and the reasonable inference arising from those facts. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor cannot vouch for the credibility of his witness by suggesting that he has some special knowledge that the witness was testifying truthfully. *Id.* at 276. However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

In this case, the prosecutor did not improperly vouch for the credibility of the witness. The challenged statements do not suggest that the prosecutor had special knowledge concerning Warren's truthfulness. Rather, the prosecutor relied on facts in evidence, and the reasonable inferences arising from those facts, to support Warren's credibility. Specifically, trial testimony revealed that Warren and defendant had no previous interaction before the incident in question, and Warren testified that he did not receive any incentives for finding inmates in possession of weapons. Further, the case involved conflicting testimony by defendant and Warren, which called their credibility into question. Warren testified that he saw defendant hold a shank and then flush it down a toilet, while defendant testified that he never possessed a shank. In this situation, the prosecutor could properly comment on the credibility of his witness during closing argument. See *Thomas*, 260 Mich App at 455. Accordingly, defendant has not shown that plain error occurred, and his claim of improper vouching fails.

Defendant also claims that his trial counsel was ineffective for failing to object to the prosecutor's statements regarding Warren's credibility. Because defendant did not raise a motion for a new trial or an evidentiary hearing in the trial court, our review is limited to errors apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). To demonstrate ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that absent the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). As discussed above, the prosecutor's statements during closing argument were not improper. Counsel cannot be deemed ineffective for failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Therefore, defendant has not shown that his trial counsel provided ineffective assistance in this regard.

## II. DEFENDANT’S STANDARD 4 BRIEF

### A. SHACKLED WITNESSES

In his Standard 4 brief,<sup>1</sup> defendant argues that the trial court improperly prejudiced the testimony of the two defense witnesses by having them testify while shackled without first making an individualized determination regarding whether the shackling was necessary. Defendant did not raise this issue below, so our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Michigan law provides that “handcuffing or shackling of a witness during trial should be permitted only to prevent the escape of the witness, to prevent the witness from injuring others in the courtroom, or to maintain an orderly trial.” *People v Banks*, 249 Mich App 247, 257; 642 NW2d 351 (2002). “[A]bsent a showing that the circumstances require handcuffing a defense witness, the fairness of the trial must not be undermined by destroying the credibility of a witness before the witness even gets the opportunity to testify.” *Id.* at 260. An appellant bears the burden of providing this Court with a sufficient record to verify the factual basis of his claim. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Defendant provides no evidence or record citations indicating that his witnesses were shackled during trial. In fact, there is no reference anywhere in the record regarding whether the defense witnesses were shackled or whether the alleged shackling was visible to the jury. Therefore, defendant has not provided this Court with a sufficient record to verify the factual basis of his argument, and his claim fails.

Defendant similarly argues that his trial counsel was ineffective for failing to object to the alleged shackling. Again, however, because defendant did not raise a claim of ineffective assistance of counsel in the trial court, our review is limited to errors apparent on the record. *Heft*, 299 Mich App at 80. Defendant bears “the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because the record does not reveal that the defense witnesses were shackled, defendant has not established the factual predicate of his ineffective assistance claim.

### B. ADDITIONAL INEFFECTIVE ASSISTANCE CLAIMS

Defendant also claims that his trial counsel was ineffective for failing to use evidence at his disposal to impeach Warren’s testimony. Specifically, defendant argues that his trial counsel should have pointed out that Warren waited several days to file his incident report, and should have introduced an incident report by Trooper Toby Baker, a seized property and evidence receipt by Sergeant Amador Ybarra, and a video of the shank being removed from the toilet to demonstrate inconsistencies between the reports and Warren’s pretrial description of the shank. Defendant does not explain how the amount of time Warren waited before filing his report could have impeached his testimony. Likewise, defendant does not explain the alleged inconsistencies between the reports, video, and Warren’s pretrial description of the shank. He also fails to provide citation to authority in support of either argument. “An appellant may not merely

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<sup>1</sup> Administrative Order No. 2004-6, Standard 4.

announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Moreover, at trial, defense counsel did highlight the fact that Warren waited several days before filing his report. Further, regarding the reports and video referenced by defendant, our review of defendant’s unpreserved ineffective assistance claim is limited to errors apparent on the record, *Heft*, 299 Mich App at 80, and neither the video nor the reports are included in the lower court record. Also, contrary to defendant’s assertions, defense counsel did question Warren’s description of the shank at trial compared to his description of the shank before trial. Under the circumstances, defendant is not entitled to relief on these ineffective assistance claims.

Finally, defendant references that counsel stipulated to “showing the jury impeachment evidence and alerting the prosecution,” and stipulated to “showing the video and alerting the Prosecution to the actual color of the shank.” Defendant does not explain or describe these alleged stipulations, and no such stipulations appear on the record, rendering this issue abandoned on appeal. See *Kelly*, 231 Mich App at 640-641. Accordingly, defendant has failed to demonstrate that his trial counsel provided ineffective assistance.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Michael F. Gadola  
/s/ Colleen A. O’Brien